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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 718

In the Matter of

FLOYD WOODRUFF and DOLLY WOODRUFF,
Bankrupts.

CHARLES H. SPARRENBERGER,
Trustee in Bankruptcy,
Petitioner,

vs.

NATIONAL CITY BANK OF EVANSVILLE,
INDIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the court of appeals is reported in 272 F. 2d 696 and is also reprinted as Appendix A to the petition for certiorari. The district court's findings and order appear at pages 46-49 of the record and the district court's judgment and order amending judgment appear at pages 49-50 of the record. The special finding of facts and conclusions of law and the opinion of the referee in bankruptcy appear at pages 39-45 of the record.

Jurisdiction

The judgment of the court of appeals was entered on December 14, 1959. The petition for a writ of certiorari was was filed on February 20, 1960. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code.

Questions Presented

The sole question is whether under the law of Indiana the mortgage executed by the bankrupts to the respondent on October 5, 1951, also secures the $46,000.00 loan made by respondent to bankrupts on November 24, 1956, and while said mortgage was still in effect, and which mortgage contains the following provision:

> "14. • • • . It is further agreed that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee."

Statement

This action was brought by the respondent against the petitioner before the Referee in Bankruptcy, in the above proceeding in bankruptcy, in the United States District Court for the Southern District of Indiana. This respondent sought to establish a secured claim by filing a written proof of claim. The respondent's proof of claim was submitted upon an agreed stipulation of facts together with Exhibits (R. 13-37). No additional evidence was offered or introduced by either the petitioner or the respondent.

The agreed facts are that on November 22, 1957, Floyd and Dolly Woodruff were adjudged bankrupts on a voluntary petition (R. 14). Prior thereto, on October 5, 1951, the respondent loaned the bankrupts Sixteen Thousand Dollars ($16,000.00) (R. 14). The bankrupts executed their promis-

sory note therefor and gave the respondent a mortgage on their real estate to secure the payment thereof (R. 16). Paragraph 14 of said mortgage contained the following provision:

> "14. This mortgage shall also secure any and all renewals of said promissory note or any part thereof. It is further agreed that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee." (R. 33).

The mortgage was duly recorded in Vanderburgh County, Indiana, the County in which the real estate was located (R. 16). On November 24, 1956, while said mortgage was still in effect, the respondent loaned the bankrupts the sum of Forty-Six Thousand Dollars ($46,000.00), for which they gave the respondent their promissory note (R. 15). On December 16, 1956, the respondent, acting by and through its vice president, Kenneth O. Henke, executed an affidavit giving notice that the said Forty-Six Thousand Dollars ($46,000.00) indebtedness was intended to be secured by the foregoing mortgage (R. 16). This affidavit was recorded in Vanderburgh County, Indiana (R. 16).

The Referee in Bankruptcy sustained the petitioner's written objections to respondent's proof of secured claim as to the Forty-Six Thousand Dollars ($46,000.00) indebtedness (R. 39-45). The district court, on respondent's petition to review, vacated the referee's conclusions of law and judgment and entered a judgment in favor of the respondent, affirming its claim as a secured claim as to both the balance of the original indebtedness and also the subsequent indebtedness (R. 46-50). This judgment was affirmed by the Court of Appeals (Pet. 15A).

Argument

The decision below is based on settled principles and is accordingly correct. It does not conflict with and it is not contrary to the applicable law of Indiana.

The sole reason urged by the petitioner for granting the petition for certiorari is that the decision below is contrary to the applicable law of Indiana. Respondent will demonstrate that the decision of the court below was clearly correct and was not contrary to Indiana law. Moreover, the issue of the validity of an open-end mortgage provision under Indiana law as between the original parties is not of sufficient importance to warrant review by this court.

The courts of last resort in Indiana have recognized the validity of open-end provisions in a mortgage. The decision of the Supreme Court of Indiana in *Brinkmeyer* v. *Brouneller* (1876), 55 Ind. 487, states at page 494 as follows:

> "'So, a mortgage or judgment may be taken and held as a security for future advances and responsibilities to the extent of it, when this is a constituent part of the original agreement; and the future advances will will be covered by the lien in preference to the claim under a junior intervening incumbrance, with notice of the agreement.'"

See also *Schmidt* v. *Zahrandt* (1897), 148 Ind. 447, 47 N.E. 335. In that case, the Indiana Supreme Court at page 337 states as follows:

> "'When the mortgage on its face gives such information as to the purpose and extent of the undertaking of the mortgage that anyone interested may, by the use of ordinary diligence, ascertain the extent of the incumbrance, then the better view seems to be that the mortgage will have precedence over subsequent incumbrances as to all advances made within the terms of a mortgage, whether made before or after such

> junior incumbrance, *even though the extent of the contemplated advances is not limited, and whether the mortgagee be bound to make the advances or not.*" (Our emphasis.)

See also *Bowen* v. *Ratcliff* (1895), 140 Ind. 393, 39 N.E. 860, where a demurrer to an answer had been sustained by the lower court. The answer set out the mortgage provisions at page 861 as follows:

> "* * * and to secure any notes that may be given for a renewal of said notes, or any part thereof, or for interest thereon, and any future advances or other indebtedness due, or that may hereafter become due, the mortgagees or either of them, from the mortgagors or either of them, to the amount of $10,000.00."

The Indiana Supreme Court went on to hold that the lower court erred in sustaining the demurrer as to two promissory notes that were executed after the date of the execution of the mortgage for the reason that they could have been future advances.

Respondent points out that *Bowen* v. *Ratcliff* (1895) 140 Ind. 393, 39 N. E. 860, is very similar to the instant case in that the mortgage provisions were similar and the court held that the two promissory notes executed subsequent to the date of the mortgage could be covered by the lien of the mortgage under the above quoted mortgage provisions.

The Indiana law is in accord with the overwhelming weight of authority in the United States in upholding the validity of open-end mortgage provisions similar to the one in the instant case.[1]

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[1] *United States* v. *Hooe*, (1805), 3 Cranch 73, 2 L.Ed. 370; *First National Bank of Guntersville* v. *Baine* (1939), 237 Ala. 580, 188 So. 64; *American Savings Bank* v. *Kemp* (1913), 21 Calif. App. 571, 132 Pac. 617; *Union State Bank* v. *Chapman* (1927), 124 Kan. 315, 259 Pac. 684; *Bunker* v. *Barron* (1899), 93 Me. 87, 44 Atl. 372;

The petitioner concedes that the Supreme Court of Indiana, the highest Indiana court, has recognized the validity of open-end mortgage provisions, but argues that the rule is qualified to the extent that where the future indebtedness is optional with the mortgagee, the future indebtedness must be made on the faith of the mortgage. However, the petitioner fails to cite any Indiana authority, in fact there is no Indiana case, that holds that there must be some evidence in addition to the terms and provisions of the mortgage itself, where the mortgage is clear and unambiguous and purports on its face to include any and all future indebtedness.

Assuming *arguendo* that the Indiana law requires some additional proof that the subsequent indebtedness was secured on the faith of the prior mortgage, the sole and uncontradicted evidence in the instant case shows that the subsequent indebtedness was secured on the faith of the prior mortgage. In the instant case, all the facts were stipulated and agreed upon by the petitioner and the respondent. The petitioner stipulated and agreed that the respondent's Vice President, Kenneth O. Henke, executed an affidavit giving

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Citizens' Sav. Bank v. *Kock* (1898), 117 Mich. 225, 75 N.W. 458; *Rice Bros.* v. *Davis* (1903), 99 Mo. App. 636, 74 S.W. 431; *Wagner* v. *Breed* (1890), 29 Neb. 720, 46 N.W. 286; *Chartz* v. *Cardelli* (1929), 52 Nev. 1, 279 Pac. 761; *Robinson* v. *Williams* (1860), 22 N.Y. 380; *Batten* v. *Jurist* (1932), 306 Pa. 64, 158 Atl. 557; *Klein* v. *Glass* (1880), 53 Tex. 37; *McDaniels* v. *Colvin* (1844), 16 Vt. 300, 42 Am. Dec. 512; *Carey* v. *Herrick* (1928), 146 Wash. 283, 263 Pac. 190; *Carlson* v. *Oppenheim Co.* (Mass.; 1956), 136 N.E. (2d) 205; *Thompson on Real Property*, Volume 9, section 4930, pages 324-326; 59 CJS 217, Mortgages, section 176; 36 Am. Jur. 721, Mortgages, Section 64; 81 A.L.R. 631, page 632; *Vidalia Production Credit Association* v. *Durrence* (1957), 212 Ga. 432, 94 S.E. (2d) 609; *Ferguson* v. *Mueller* (1946), 115 Col. 139, 169 P. (2d) 610; *First National Bank of Plains* v. *Green Mountain Soil Conservation District* (Mont.; 1957), 293 P. (2d) 289; *Gilpatrick* v. *Hatter* (Okla.; 1953), 258 P. (2d) 1200; *In re Turner* (D.C. Ky.; 1943), 51 F. Supp. 740; *Bagley* v. *Page* (1937), 57 R.I. 186, 189 Atl. 39.

notice of the fact that the respondent's subsequent indebtedness was intended to be secured by the prior mortgage (R. 16). Respondent submits that under this evidence, it made the Forty-Six Thousand Dollars ($46,000.00) subsequent loan to the bankrupts on the faith of the prior mortgage. This evidence is undisputed and uncontradicted anywhere in the entire record.

Obviously, the petitioner disagrees with the District Court and the Court of Appeals and argues that Paragraph 14 of the mortgage, which is the open-end provision in question, does not include the subsequent indebtedness of November 24, 1956. The petitioner, at pages 10 and 11 of his petition, advances certain rules of construction, supported by authority, which he contends should be used in construing ambiguous instruments.

Respondent submits that none of these aids to construction are applicable in the instant case, because all of the written instruments pertaining to this matter, including Paragraph 14 of the mortgage, are clear and unambiguous. Paragraph 14 of the mortgage states in part:

> "It is further agreed that this mortgage shall secure the payment to mortgagee of *any other indebtedness* which mortgagors may *from time to time, while this mortgage is in effect*, owe the mortgagee." (Our emphasis.)

Respondent submits that the portion of Paragraph 14 quoted above leaves no doubt or question as to the intent of the parties. The quoted phrase did not just include "other indebtedness." Paragraph 14 goes beyond this and comprehends all other indebtedness by the use of the phrase "any other indebtedness." Paragraph 14 further clearly shows that it was intended to include "any other indebtedness" which the mortgagors might owe the mortgagee at any time in the future, or "from time to time" while the mortgage was in effect.

In the instant case, it was stipulated by and between the parties that on the 24th day of November, 1956, the respondent loaned to the bankrupts the principal sum of $46,000.00, and that a promissory note was executed by the bankrupts therefor (R. 15-16). The stipulation of facts further shows that the mortgage of October 5, 1951 (R. 27-33), was in effect on November 24, 1956 (R. 14-17). The $46,000.00 indebtedness of the bankrupts certainly constitutes "other indebtedness" which they owed respondent bank, in addition to the original $16,000.00 loan. The stipulation of facts further shows that the Vice President of respondent bank executed and recorded an affidavit giving notice of the fact that the $46,000.00 indebtedness was intended to be secured by the prior mortgage (R. 16). Thus, Paragraph 14 of the mortgage, by its unambiguous terms, includes "any other indebtedness" and, therefore, certainly included the $46,000.00 note. In addition, the uncontradicted facts contained in the stipulation show that the $46,000.00 note was intended to be secured by the mortgage (R. 16).

The respondent points out that the Indiana rule which is applicable to the instant case, is that stated by the Supreme Court of Indiana in the leading case of *Jenkins* v. *King* (1946), 224 Ind. 164, 65 N.E. (2d) 121, where at page 123 of the Northeastern Reporter, the Court said as follows:

> "A court must give effect to the meaning and intention of the parties as expressed in the language of their contract, in the absence of anything to show legal impediment to prevent their entering into any contract they see fit or their expressing it in the language of their own choice. Where there is no right to the reformation of a written contract, the rights of the parties must be determined according to their writing.
>
> "In the absence of an ambiguity it is not within the function of the judiciary to look outside of the instru-

> ment to get at the intention of the parties. Their sole duty is to find out what was meant by the language of the instrument. In other words, the object to be attained in interpreting a contract is to ascertain the meaning and intent of the parties as expressed in the language used. * * *."

The petitioner further argues that Paragraph 14 of the mortgage related back only to the consideration clause and the other contingent, but specific and further indebtedness to be secured by the mortgage, such as taxes, insurance and repairs and that the Court of Appeals erroneously denied this "relation back" theory. An examination of the entire mortgage instrument shows clearly how fallacious petitioner's argument is.

First, the consideration clause provides that the mortgage is

> "* * * also to secure the faithful performance of all the covenants, conditions, stipulations and agreements herein contained, * * *" (R. 28).

Paragraph 14 of the mortgage provides in part:

> "It is further *agreed* that this mortgage shall secure the payment to mortgagee of any other indebtedness which mortgagors may from time to time, while this mortgage is in effect, owe the mortgagee." (Our emphasis) (R. 33).

It is obvious that Paragraph 14 of the mortgage contains an agreement by its express terms and the consideration clause specifically covers all the agreements contained in the mortgage. Therefore, the mortgage was made in consideration, among other things, of the agreement that the mortgage should secure any other indebtedness, including subsequent indebtedness.

Paragraph 3 of the mortgage contained an agreement that the mortgagors shall pay all taxes, assessments, water rates and other governmental charges (R. 29). Paragraph 4 of the mortgage provides that the mortgagors shall maintain the mortgaged premises in good repair and condition (R. 29-30). Paragraph 5 provides that the mortgagors shall keep the improvements on the property insured against loss by fire or other hazards (R. 30). Paragraph 6 of the mortgage provides that in the event of foreclosure of the mortgage any sums expended for continuation of the abstract of title shall become a part of the debt of the mortgage (R. 31). Paragraph 7 of the mortgage provides that:

> "In the event of the failure of the mortgagor to keep the buildings on said premises and those to be erected on said premises, or improvements thereon, in good repair, said mortgagee may pay such taxes, assessments, mortgage and hazard insurance, make such repairs as in its discretion it may deem necessary properly to preserve the property and any sums so paid shall be a further lien on such premises under this mortgage, payable forthwith, with interest at the rate of six per centum (6%) per annum until paid." (R. 31.)

Respondent submits that it is obvious that Paragraph 7 of the mortgage was included for the sole and express purpose of having the lien of the mortgage extend to and cover the specific items set out in Paragraphs 3, 4, 5 and 6 of the mortgage and consequently, that Paragraph 14 of the mortgage was not included to cover these specific items. To construe the mortgage otherwise would be a duplication.

After Paragraph 7 of the mortgage expressly extended the lien of the mortgage to the specific items set out in Paragraphs 3, 4, 5 and 6 of the mortgage, Paragraph 14 of the mortgage then expressly covers any other indebtedness which the mortgagors may owe to the mortgagee in the fu-

ture while the mortgage is in effect. The Court of Appeals correctly denied petitioner's so-called "relation back" theory because the mortgage is clear and unambiguous and plainly speaks for itself.

Respondent submits that the Court of Appeals correctly held that the mortgage was unambiguous when it said in its decision below:

> "Paragraph 14 clearly provides that the mortgage shall not only secure any and all renewals of the promissory note specifically named therein, but shall, in addition, secure the payment to the mortgagee of any other indebtedness, which the mortgagors may, from time to time, owe the mortgagee, while the mortgage is in effect." (Pet. A 22)

Conclusion

Since the decision below is correct, and there is no conflict with the Indiana decisions or law, and since the question presented by this case is neither significant nor novel, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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